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THROUGH A GLASS DARKLY: LAW, CULTURE, AND THE MEDIA

Lawrence M. Friedman*

INTRODUCTION

This Commentary is written for a symposium paying tribute to the work of Marc Galanter. In the little world of law and society studies, his work stands out for its extraordinary range, quality, and diversity. Nobody else could have written about the Bhopal disaster, the organization of law firms, the rise and fall of litigation, the social meaning of lawyer jokes, the Indian caste system, all bound together by a keen instinct for asking smart questions and giving smart answers. His work is invariably illuminating; it invariably tells us a lot about the role of law in this and other societies.

Much of his work has been about what we might call the architecture of the legal system: how legal *structures* bend legal behavior within given cultures. Of course, structures do not live in a vacuum. Structures are where they are and what they are because of the culture and society in which they are embedded. Culture and structure are like Siamese twins; they are joined at the hip. But it is possible, of course, to study them individually. Marc's most famous article, *Why the "Haves" Come Out Ahead*,¹ is mostly about structure, about the way in which the architecture of litigation affects outcomes. His marvelous study of lawyer jokes is mostly about culture.²

In this Commentary, I will focus mostly on culture, and in a particular way. And mostly in a particular society, the United States of America. In our society, culture interacts with the legal structure in crucial ways because of the importance of something we can call public opinion, a critical feature in societies that are (relatively) democratic. Laws are made in Congress and in state legislatures by men and women voted into office. Their constituents reward those who do what the constituents want and punish those who do not. In short,

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1. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95-96 (1974).

2. MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 5 (2005).

public opinion (however you define it) helps make law. Not directly, of course, but insofar as it reaches and influences lawmakers. "Lawmakers" are not just representatives. Judges are lawmakers too. They also respond to public opinion, though more subtly perhaps, and through more complicated routes and tunnels. How and why judges respond to social forces is a difficult and much vexed question. But that they do respond is pretty much undeniable. The response can be quite unconscious. Judges, though, are human beings and they inhale the same influences as other members of society.

But what is it that creates public opinion? Where does it come from? There is no quick and dirty answer. In some ways, public opinion is quite mysterious. Movements, ideas, trends, and fashions sometimes seem to come out of nowhere. At other times, events occur and situations arise that quite obviously have a direct influence on public attitudes and behavior: a war, a plague, an earthquake, a scandal, a game-changing invention or innovation, a cycle of boom and bust.

Popular culture is a fairly slippery term. It refers to elements of culture—movies, sports, TV shows, and the like—that have a mass audience. Often people contrast "high culture" (Beethoven) with "low" or "mass" or "popular" culture (rap music). I prefer to join the two, insofar as they are popular, that is, insofar as they are not some fringe or esoteric taste (which Beethoven, I sincerely hope, is not). There is obviously a close relationship between public opinion and popular culture; in some regards, popular culture helps shape public opinion.

You cannot think or write about popular culture without taking the media into account. The media are, in the first place, carriers of popular culture. TV *is* popular culture, not just a vehicle that beams it to an audience. And if popular culture shapes or helps shape public opinion, then the role of the media in the formation of public opinion is clearly significant.

This seems quite obvious. The media are, to begin with, sometimes passive carriers and conduits: when they broadcast, for example, a live press conference. But they are, for the most part, much more than this. People in our society get much of their information (and misinformation) from the media. The media influence popular culture and public opinion. They are not just a channel through which material flows. They control, as it were, the agenda. They mold and shape what people see, hear, and read. They act as a filter and a prism. You can multiply the metaphors indefinitely. All this is within limits: the viewing public is not uncritical, the audience is not made up of zombies or robots, messages can sink in and leave a mark; they can

incite ideas and behaviors; or they can go in one ear and out the other. Nonetheless, nobody can doubt the significant role of the media in our society.

How the media report on, and describe, law, lawyers, courts, and (in general) the legal system is a fertile field for research. What sort of impact do the media have, and why? These impact questions are extremely difficult to answer. In this Commentary, I do not propose even to suggest an answer. My aim is much more modest. First, I want to discuss, briefly, the filtering aspect of the media. What do the media report and, in addition, what do they *not* report? A newspaper, for example, does not print everything that might conceivably be printed. It selects. It only prints “news,” or what is newsworthy. “News” is hard to define. Basically, a newspaper defines as news, and reports, whatever it thinks readers will find interesting and important.

But the newspaper will also decide *not* to print things that readers would love to read about. Hence, I will describe some aspects of the rise and fall of censorship and self-censorship. The law at one time clearly outlawed certain stories, plays, movies, and books. This was the point of laws against pornography, of which more later. Mostly censorship aimed at forbidding frank talk about sex. Self-censorship was somewhat broader; it went beyond sex, and certainly beyond what the law actually required.

Even more briefly, I deal with the modern *content* of the media. What messages do the media convey about the legal order, and to what degree do these messages seep into popular culture? And I also want to mention the vital and growing role of the media in the political system. This year, 2012, was an election year. Every day, the media presented us with material that bore on the election campaign: political ads, reports, press conferences, news about the candidates. Here, I try to say a few words about how the media and legal culture interact with the political and legal systems.

II. CENSORSHIP AND SELF-CENSORSHIP

There is a huge amount of literature on this issue, broadly considered. Throughout most of our history, mainstream newspapers and mainstream books did not dare publish anything that could be considered obscene or pornographic. Freedom of speech and the press, enshrined in the Bill of Rights and its equivalents in the states, never stood in the way of bans on pornography.³ Every state probably had

3. See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973). The Miller Court noted that “[o]bscene material is unprotected by the First Amendment.” *Id.*

such a law. No boards of censorship enforced these statutes. But it was clearly understood that respectable newspapers would print only news that was fit to print. Any graphic description or frank discussion of sex was suspect, if not downright taboo. Certainly, in the nineteenth century, there were raucous and bumptious newspapers and magazines, some of them eager to test the limits of propriety; these included organs like the *National Police Gazette*.⁴ But there were limits beyond which even these periodicals could not go—at least if they wanted a smidgen of respectability and were anxious to avoid prosecution.

It was a very prudish age, at least on the verbal level, and at least on the surface. This was a period in which the Oxford Dictionary, rigorously scientific in every other regard, could not bring itself even to *mention* two very basic English words, known (one supposes) by almost every adult.⁵ Yet pornography flourished—under cover. State laws against pornography⁶ were not particularly successful in stamping out the pornography trade. Federalism was one problem: dirty books and pamphlets could be printed in New Jersey, say, and sent to customers in New York in the proverbial plain brown wrappers. Partly because of this situation, the national Congress stepped into the picture. The famous Comstock law of 1873 made it a crime to send obscene material through the mails; it also banned from the mails “any article or thing designed or intended for the prevention of conception or procuring of abortion.”⁷

At the beginning of the twentieth century, a new form of popular entertainment swept the country: the movies. Theaters sprang up in cities like mushrooms after rain.⁸ Precisely because the new medium was so popular, respectable people worried about its impact on the general public. The movies could be dangerous; they had the power to corrupt the morals of ordinary people—and children—who sat in darkened theaters, mesmerized by the vivid images on the screens. In

4. See Lawrence M. Friedman, *The Eye that Never Sleeps: Privacy and Law in the Internet Era*, 40 TULSA L. REV. 561, 565 (2005).

5. Even today, the very staid and respectable New York Times refuses to violate Victorian standards as far as language is concerned. The Times will not bring itself to use, for example, a word like “shit”; instead it might say that a person used a “barnyard epithet,” or the like. See Patrick LaForge, *A Rare Four-Letter Day in the Times*, N.Y. TIMES, Aug. 23, 2007, <http://cityroom.blogs.nytimes.com/2007/08/23/a-rare-four-letter-day-in-the-times>.

6. See, e.g., Act of Apr. 28, 1868, ch. 430, 1868 N.Y. Laws 856.

7. Comstock Act, ch. 258, sec. 2, § 148, 17 Stat. 598, 599 (1873). For a discussion of state regulation and the background of this law, see DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK 265–66 (2009).

8. See GERALD MAST & BRUCE F. KAWIN, A SHORT HISTORY OF THE MOVIES 47 (8th ed. 2003).

1907, Chicago passed an ordinance that gave the chief of police the power to ban “obscene or immoral” movies.⁹ The ordinance was challenged in court, but the Illinois Supreme Court turned down the challenge.¹⁰ Movies were cheap and they appealed to “classes whose age, education, and situation in life specially entitle[d] them to protection against the evil influence of obscene and immoral representations.”¹¹ In 1915, The United States Supreme Court agreed: censorship was valid and appropriate. An Ohio statute set up a board of censors, and instructed it to withhold approval from movies unless they were “moral, educational or amusing and harmless.”¹² The Supreme Court upheld the law. The Court echoed the sentiments of the Illinois court and brushed aside arguments about freedom of speech. The guarantee of free speech, the Court said, did not apply to “shows and spectacles.”¹³

These censorship boards are history, of course. So is the vigorous, and effective, self-censorship that the motion picture industry, under pressure, adopted in the 1930s.¹⁴ The “code” had a long list of taboos, which movies had to respect or suffer the consequences. Not only was any kind of explicit sex outlawed, but the movies had to comply with rather strict moral standards.¹⁵ A criminal had to be punished. An adulterer had to suffer the consequences. Foul language was not permitted. Excessive violence was outlawed. Nothing that poked fun at religion was allowed.

Ultimately, the sexual revolution and a new age of permissiveness swept the self-censorship code into the dustbin of history. All that remains is a rating system, which is essentially concerned with what children can or should see: “G” movies are for everybody; “PG” stands for parental guidance; “R” movies are not for children, unless an adult takes them; and “NC-17” movies are barred to children alto-

9. See *Block v. City of Chicago*, 87 N.E. 1011, 1012 (Ill. 1909).

10. *Id.* at 1013.

11. *Id.*

12. *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 240, 244–45 (1915).

13. *Id.* at 243, 244–45.

14. The Motion Picture Production Code was adopted in 1930 by the Motion Pictures Producers and Distributors Association. The Code set censorship guidelines—including a list of “Don’ts” and “Be Carefuls”—that governed the movie industry until the 1960s. See Ruth Vasey, *Beyond Sex and Violence: “Industry Policy” and the Regulation of Hollywood Movies, 1922–1939*, in *CONTROLLING HOLLYWOOD: CENSORSHIP AND REGULATION IN THE STUDIO ERA* 102, 102, 104 (Matthew Bernstein ed., 1999).

15. See *The Motion Picture Production Code of 1930*, ART REFORMATION, <http://www.art-reformation.com/a001/hays-code.html> (last updated Apr. 12, 2006).

gether.¹⁶ For grown-ups, on the other hand, basically anything goes. And even for children, the standards have gotten looser over the years. Some current "PG" movies would have been banned outright in an earlier day.

To be sure, statutes against "obscenity" are still on the books. The penal code of New York, for example, makes it a crime to produce, sell, or own obscene material.¹⁷ Books and pictures are "obscene" if their "predominant appeal" is to the "prurient interest in sex"; the standard is that of the "average person" in the community.¹⁸ Material is further defined as obscene if it "depicts or describes in a patently offensive manner," the sex act, masturbation, or "excretion or lewd exhibition of the genitals," provided the material has no serious literary, artistic, political, or scientific value.¹⁹ The obscenity statute of Virginia, to take another example, also uses as a test a "prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement [or] excretory functions."²⁰

The texts of these laws still sound stern and Victorian, but the reality is entirely different. After all, in the high and palmy days of Victorian prudery (or hypocrisy), the authorities banned books and plays that even the darkest corners of the Bible Belt would consider totally harmless today. Practically everybody is interested in sex. The question is, what makes this interest "prurient," or "shameful or morbid"? The criteria shift over time. Today, in the big, wicked cities, there are no real limits, just as there are no real limits in film. Totally hard-core pornography is on view in "adult" bookstores; on the Internet, it is positively ubiquitous.

Sex was not the only taboo subject in the past. Censorship of the movies was not just about sex; it was also about violence, crime and punishment, and about protecting religious sensibilities. Race relations was also a touchy subject. Miscegenation was not to be shown. Television, too, in its early years at least, was extremely "squeamish" about race. African-Americans in the 1950s were almost invisible on television dramas, except when they played the roles of maids and

16. See *What Each Rating Means*, MOTION PICTURE ASS'N OF AM., <http://mpaa.org/ratings/what-each-rating-means> (last visited Jan. 10, 2013).

17. N.Y. PENAL LAW § 235.05 (McKinney 2008).

18. *Id.* § 235.00.

19. See *id.* §§ 235.00, 235.15(1). This and succeeding sections of the law spell out the meaning and scope of the criminal law of obscenity in great detail—even to the point of providing that, in a prosecution for obscenity, it is "an affirmative defense" that the defendant was doing nothing more than acting as a "candy stand attendant," selling popcorn and other goodies, in a movie house that was violating the law by showing obscene movies. See *id.* § 235.15(2).

20. VA. CODE ANN. § 18.2-372 (1950).

servants. In 1954—the same year as *Brown v. Board of Education*—CBS even went so far as to air a version of Huckleberry Finn in which the black slave, Jim, was simply omitted.²¹ The media refused to do anything that would offend white southern opinion.

The civil rights revolution changed all that. And the media, deliberately or not, played a role in that revolution. The violence and the antics of white supremacists in the south played very badly on national TV.²² Today, people see African-Americans on TV all the time, and in all sorts of roles. Even interracial romance and marriage is commonplace in the media; until the civil rights era, many states absolutely forbade sex and marriage across race lines.²³ It seems reasonable to suppose that if people *see* an integrated society (or a more or less integrated society) in movies and on television, they will be more likely to accept integration in their daily lives. But it is no easy task to separate out cause and effect.

Catharine MacKinnon and some other feminists insist that pornography is an important element in patriarchy.²⁴ They argue that it promotes or perpetuates the subjugation of women. This belief makes these feminists the rather strange bedfellows of conservative moralists. It is not easy to show the actual impact of pornography on gender relations. Prime time network TV does not show naked bodies or people having sexual intercourse, but prime time TV does constantly chatter away about sexual topics. Some matters that were once totally taboo (for example same-sex relations or contraception) are now everyday matters on TV.²⁵ How the media treat women and how they treat gender relations probably has more impact on “patriarchy,” one way or another, than dirty books and movies. There is also, very definitely, a culture of permissiveness in our times; the sexual revolution is real. The media did not make the revolution. But it may reinforce and disseminate the basic ideas and attitudes of that revolution.

21. ERIC BURNS, *INVASION OF THE MIND SNATCHERS: TELEVISION'S CONQUEST OF AMERICA IN THE FIFTIES* 206 (2010).

22. See Little V. West, Comment, *Awakening the Moral Consciousness: On the Numbing of the Conscience of a Nation*, 83 N.C. L. REV. 289, 312 n.119 (2004). West noted that during the Civil Rights era, television was “a new and powerful medium of forcing people to confront social issues in the comforts of their own home.” See *id.*; see also STEVEN KASHER, *THE CIVIL RIGHTS MOVEMENT: A PHOTOGRAPHIC HISTORY, 1954–68*, at 70–71 (1996).

23. See generally PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 192 (2009). In the 1950s and 1960s, a number of states repealed their laws. The Supreme Court struck down the rest of them in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

24. See, e.g., Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 19 (1985).

25. See Brian Stelter, *Gay on TV: It's All in the Family*, N.Y. TIMES, May 9, 2012, at A1.

In short, the mainstream media have had a long and rich history of self-censorship as well as real censorship, all of it now in process of decay. The late nineteenth century was the age of the so-called yellow press; mass-market newspapers fought each other for circulation, using (very often) quite dubious means. Still, there were matters that simply were not reported, and not simply those that related to sex and reproduction. Some items that were not pornographic or explicit were nonetheless suppressed. The sex lives of public officials is one example. Surely, some reporters must have been aware that President John F. Kennedy was an incessant womanizer, but not a word of this appeared in the newspapers.²⁶

The British press, in the past, kept a tight rein on anything that reflected badly on the royal family. An egregious example occurred in 1936. The Prince of Wales, who became King Edward VIII when his father died, was involved with an American woman, Wallis Simpson. Simpson was in the process of divorcing her husband. For this and other reasons, she was unthinkable as Queen of England; the government and the Church of England found her totally unacceptable. The result was a constitutional crisis. Rumors of the affair were flying about; it was hot news everywhere in the world. But the British press did not print a word of it for months. It was a genuine "conspiracy of silence."²⁷ Finally, statements from church officials broke the taboo, and the issue came out of the closet. In the end, the King abdicated in favor of his brother and was free to marry the woman he loved.

Today, the doings and misdoings of the royals are rich fodder for the English press, and not just the tabloids. The royal family is no longer protected by a magic ring of immunity. Royalty in general, at least in the developed world, no longer has any sacred quality. Nor are prime ministers, presidents, high officials, or their families safe from the media. The media eagerly report every scandal. Has this new situation made a political difference? Possibly. Some voters, who chose Kennedy because they thought he was a virtuous family man, might have had second thoughts if they knew he was sleeping with scores of women. But that was then. The impact of a sex scandal is certainly less today than in the past. The trials and tribulations of

26. See Robert Dallek, *JFK's Intern Affair Tests Presidential Character*, DAILY BEAST (Feb. 9, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/02/08/jfk-s-intern-affair-tests-presidential-character.html>. Dallek wrote that in researching his biography of Kennedy, he spoke to numerous journalists who "said they knew about Kennedy's womanizing but conformed to current standards that deterred them from writing about it." *Id.*

27. *Cf. King Quarrels with Duchess*, L.A. TIMES, Nov. 23, 1936, at 6.

President Clinton are ample proof, or, for that matter, the complex love life of Newt Gingrich.

Newspapers also never reported news about the President's health. No medical bulletins on the subject were released until the 1950s. On the contrary, the whole issue was wrapped in dark secrecy. The medical problems of President Grover Cleveland are one prime example. In 1893, doctors found a tumor in his mouth and jaw (President Cleveland habitually chewed tobacco). The doctors performed an operation on Cleveland on his yacht, off the coast of Long Island. No news about this procedure was given out. Instead, the press was told that the President was on a vacation cruise. One newspaper in Philadelphia somehow discovered the truth and printed a story about the operation. Other newspapers denounced this story as "sensationalism"; they reported that the President was extremely healthy.²⁸ It seems almost certain that they knew this was wrong.

The case of Franklin Delano Roosevelt was, if anything, more egregious. The President, a polio victim, was completely unable to walk on his own. The public knew (more or less) that the President was a polio victim, but they were never allowed to see the effects of this disease. Public appearances were carefully stage-managed to make him seem as normal as possible. Astonishingly, out of some 35,000 photographs of the President, there are only two that show him sitting in a wheelchair.²⁹ Yet members of his staff, reporters, and probably many other people must have known about his true condition. The newspapers also said little or nothing about the President's general health. Roosevelt aged greatly during his years in office. By the time he was elected to a fourth term, he was in fact desperately ill. Yet, nothing about this appeared in the newspapers.³⁰ There was, apparently, a kind of understanding between the media and the administration; nothing would be allowed to leak out that might suggest the true situation.

Medical bulletins began to appear, in a serious way, during the administration of Dwight Eisenhower. In 1955, President Eisenhower suffered a heart attack. At first, the administration tried to hide this fact. The President, it was reported, was "merely suffering a common digestive upset."³¹ But then a decision was made, perhaps by the

28. For a description of the whole affair, see MATTHEW ALGEO, *THE PRESIDENT IS A SICK MAN* 144–45 (2011).

29. HUGH GREGORY GALLAGHER, *FDR'S SPLENDID DECEPTION*, at xiii (1985).

30. See generally STEVEN LOMAZOW & ERIC FETTMANN, *FDR'S DEADLY SECRET* (2009).

31. Russell Baker, *Eisenhower Is in Hospital with 'Mild' Heart Attack; His Condition Called 'Good'*, N.Y. TIMES, Sept. 25, 1955, at 1.

President himself, that the public deserved an honest statement of facts. Regular medical bulletins followed. These became more and more detailed. In one instance, for example, the public was solemnly informed that the ailing President had "had a good bowel movement" and had "enjoyed a breakfast of prunes, oatmeal, soft-boiled egg, toast and milk."³² In 1956, Eisenhower ran for re-election; his health was, naturally, something of an issue. This was all the more reason to publish quite detailed reports about his medical condition.

This was the beginning of what came to be the norm: regular check-ups, detailed reports, and full disclosure (one hopes) of any serious medical problem. Or even disclosure of not so serious problems, such as the "noncancerous bumps," or "actinic keratoses," that President Clinton had on his skin, which were frozen off with liquid nitrogen.³³ Once the media embarked on this path, there was no turning back. The public presumably expected to be told about the health of the President and it was assumed—correctly, no doubt—that the media would pounce on any failure to report, or any attempt to sugarcoat the President's state of health. No doubt the impulse to keep problems secret has never gone away. President Kennedy's medical problems were handled almost as discreetly as his sex life. But this kind of quasi-censorship became less and less likely—or possible.

What conclusions can we draw from this brief run through the history of censorship and self-censorship? A clear trend is visible. The media were once more tight-lipped and Victorian than they are now. Their self-censorship had the effect of protecting elites and political leaders. There was a kind of implicit understanding to that effect. This shield of immunity is now gone with the wind. Leaders are naked before the public, so to speak. Yet, on the other hand, the public itself has changed. It knows more and sees more, but it is also, on the whole, more permissive and forgiving. The Clinton scandals hardly seemed to affect his popularity. Honesty about a president's health is itself a healthy development.

32. Russell Baker, *Eisenhower Is Improving; Chance of Full Recovery Called 'Reasonably Good'*, N.Y. TIMES, Sept. 27, 1955, at 1.

33. John F. Harris, *Noncancerous Bumps Removed from Clinton*, WASH. POST, March 28, 1995, at A5. Actually, the bumps were revealed only after reporters asked the Press Secretary why the President "had a red blotch on his forehead." *Id.* The excuse was that the procedure was "routine." *Id.*

III. LAW IN THE GENERAL CULTURE

What do the media tell us about law and the legal system and how does this affect the legal culture? There is something of a literature on law and popular culture,³⁴ but, in my view, nowhere near enough.

Certainly, *law* pervades popular culture. It would be hard to count the total number of movies, plays, and television dramas that have a legal theme. A high percentage of air time is devoted to shows about the police, the FBI, coroners, forensic investigators, judges, juries, lawyers of all sorts and stripes, and so on. By the 1970s, “cop” shows had supplanted “westerns” in the United States; Great Britain followed soon after.³⁵ During the week of February 20, 2012, out of approximately seventy regular programs in primetime (8:00 to 11:00 PM EST), on the four major networks, no less than twenty were crime- and law-related dramas. The show with the most viewers, according to the Nielsen ratings, was *NCIS*, which stands for Naval Criminal Investigative Service. No less than eight out of the top twenty programs, in audience size, were criminal dramas. Five of them had over twelve million viewers per episode.³⁶

This constant and steady diet of law must mean that a lot of what the public knows, or thinks it knows, comes from popular culture—television in particular and now, to be sure, the Internet. Of course, the television screen is a sort of funhouse mirror. It gives the audience a very distorted picture of law and the legal system. In the first place, what the audience sees is overwhelmingly criminal justice: police, detectives, forensic scientists, courtrooms, judges, and trials. The rest of the legal system is largely ignored, at least as far as television dramas are concerned. It goes without saying, too, that the picture is far from accurate, even for criminal justice. Television and the media tell us very little about routine cases, or about plea-bargaining, or even about the fact that not every crime results in an arrest.

Trials on television (both real and fictional) distort reality in two contradictory directions. First, they give an impression of a system in which due process is rigorously followed. Everything, from selection of a jury through to verdict, is done according to Hoyle. Second, and

34. See, e.g., RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000); Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L.J.* 1579 (1989).

35. RICHARD SPARKS, *TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE* 27–28 (1992).

36. *Network TV Ratings: Week of February 20, 2012*, TV-AHOLIC'S TV BLOG (Feb. 28, 2012), http://tvaholics.blogspot.com/2012/02/complete-nielsen-ratings-for-week-of_28.html. The four networks are NBC, Fox, ABC, and CBS. If one included offerings on cable, of course, there would be even more shows with a legal angle.

actually a by-product of the first, is the notion that it is all some sort of game, a joust between tricksters in which the side that has the better and more expensive lawyer wins. This may well have been the lesson of the O. J. Simpson trial.

As I said, civil cases hardly get any space on primetime television. Daytime television, on the other hand, is a different story. This is (among other things) the domain of shows that simulate courtrooms—the judge shows, and above all, *Judge Judy*. Judge Judith Sheindlin was at one time an actual judge. Now, she is one of the highest paid stars of television. Millions of people watch *Judge Judy*. She is the most popular of the “judges” on television, but by no means the only one.³⁷

What do you see when you watch *Judge Judy*? You see something that looks at least somewhat official. Judge Judy wears a robe. She sits on a judge-like bench. A big, beefy bailiff stands nearby to keep order, if that becomes necessary. Judge Judy bangs away with a gavel. She hears and decides what seem to be actual cases. Litigants come before her, make their case as best they can, and then Judge Judy decides.

The cases vary of course, but they are all small-bore matters. Nobody sues a corporation in Judge Judy’s “court.” Friends and neighbors sue each other over loans gone sour; boyfriends sue girlfriends and vice versa. Landlords and tenants wrangle with each other. The audience hears about borrowed cars, dented fenders, engagement rings that should or should not go back to where they came from, deadbeat dads, drunken roommates, and so on. No lawyers ever show up on Judge Judy’s show. Fine points of evidence or procedure are never mentioned. And justice, such as it is, has to be done before the show ends, and must never interfere with commercials.

Judge Judy’s personality may be the key to her success. She is definitely not sweet and motherly. She is all acid and wrath. She regularly chews out the litigants, or at least one of them. She is rude, autocratic, caustic. She interrupts constantly. She yells at those who are in the wrong (as she sees it). She even yells, at times, at the winners; she tells them, in one way or another, to “get a life.”

Do these judge shows have an impact? They do present a particular image of justice, and they may raise certain expectations on the part of the public—at least the public that watches *Judge Judy*. But, more likely, shows like this reflect general norms; they do not create them.

37. See Lawrence M. Friedman, *Judge Judy's Justice*, 1 BERKELEY J. ENT. & SPORTS L. 125, 125 (2012).

Judge Judy's law is not formal law. Rather, it consists of ideas, attitudes, and informal rules that circulate among members of the public.

The image of *lawyers* in the media is also quite complex and hard to sum up in a few lapidary sentences. That image is surely quite mixed. At one end of the scale is Atticus Finch, the lawyer in *To Kill a Mockingbird*, the very soul of honor. At the other end are the lawyers in the movie *The Devil's Advocate*, quite literally agents of the devil. And in between are the lawyers in shows like *L.A. Law* and its successors—some are honorable and good; others are crafty and dishonest.

Marc Galanter has published a wonderful study of lawyer jokes, *Lowering the Bar*.³⁸ The jokes are almost universally negative. The best that can be said is that some jokes simply show the lawyer as cunning and clever. Mostly, lawyers are pictured as dishonest, money-grubbing, parasitical scoundrels. This is an interesting social phenomenon: Why are lawyers so roundly disliked? Paradoxically, this may be related to the fact that they are ubiquitous and totally essential to American society. This has been true for quite a while; indeed, some of the lawyer jokes go back to the nineteenth century. The media picture of lawyers is much more mixed, though by no means, as we mentioned, universally positive.

Torts are the one kind of civil case that is not neglected—at least in print media. Newspapers have helped spread the word that the tort system is out of control.³⁹ They do this by publicizing weird and extreme cases, and by downright distortion of the facts. The message is that there is a crisis in the legal system, caused by “proliferating lawsuits, opportunistic plaintiffs, and greedy lawyers.”⁴⁰ The famous incident of the woman who sued McDonald's after spilling a cup of very hot coffee in her lap is held up as an example of how the system has gone amok. The media coverage was biased and hysterical; it made any “rational discussion of the dispute . . . virtually impossible”; it was instead fodder for the tort reform movement.⁴¹ Wild publicity about extreme cases and stories that were nothing more than urban legends did indeed help that movement. This, then, is one area in which it is plausible to argue that the media have actually made a policy difference.

38. See GALANTER, *supra* note 2.

39. See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 475 (2006); see also John Schwartz, *Documentary Gives Hot Issue a Caffeinated Jolt*, N.Y. TIMES, June 26, 2011, at 14. The documentary in question concerned the “massive public-relations campaign” of the tort reform movement. Schwartz, *supra*.

40. WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 265–66 (2004).

41. *Id.* at 184.

This might be an extreme instance. Every political figure—and every interest group—makes its case by and through the media. There is no other way. Scandals and incidents create public policy, for good and for bad. Environmental disasters feed the environmental movement. Campaigns, like those against drunk driving, smoking, and saturated fats, lead to changes in public opinion and, very often, to changes in the law. News about horrific crimes has a particularly sharp effect. Laws get passed with nicknames that commemorate victims, for example, “Megan’s Law”⁴² and “Jessica’s Law.”⁴³

For all these reasons, it is hard to draw firm conclusions about whether and how the media affect peoples’ attitudes toward the law, let alone how people use or abuse the law. All one can say is that a great deal of the process of making and carrying out law today depends on public opinion, and that public opinion depends on the media. But campaigns and media messages have no guarantee of success. The McDonald’s incident—a tempest in a coffee cup—was blown out of all proportions because it told the public something it seemed to want to hear. It reinforced an old cultural tendency, “revitalizing long-standing American ideals of self-governed, autonomous individuals,” and suspicion of government and the welfare state.⁴⁴ Of course, not everybody buys this package of ideologies. But its impact is hard to deny.

IV. MEDIA AND THE POLITICAL PROCESS

The third aspect that I want to mention, briefly, is the role of the media in the *political* process. The 2012 election brought a political season that seemed particularly raucous and tumultuous. It was a season, too, in which the pervasive role of money was blindingly obvious. A lot of liberals blame the trouble on *Citizens United*.⁴⁵ That case certainly did not help. But money was a major factor in politics long

42. See N.J. STAT. ANN. §§ 2C:7-1, -19 (West 2005). First adopted in New Jersey, one form or another of this kind of law has been instituted in every state. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1077 (2011–2012). The underlying idea is to create some sort of mechanism that allows people to know that their neighbor, for example, is a convicted sex criminal.

43. The original law, FLA. STAT. § 800.04 (2011), provided for harsh mandatory minimum sentences for sex crimes against children. At least twenty-five states have their own versions. See NAT’L CONFERENCE OF STATE LEGISLATURES, STATE STATUTES RELATED TO JESSICA’S LAW (2008), available at www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf.

44. HALTOM & McCANN, *supra* note 40, at 294.

45. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 929 (2010).

before that case was decided.⁴⁶ And it would be a major factor even if the case had gone the other way. Billions are spent on elections nowadays. And most of that money finds its way into the coffers of the media. In fact, most of it goes for television ads.

Television ads cost money, and lots of it. Partly because of this, most television ads are quite short. That means that the ads have to be punchy and dramatic; they have to catch the attention of the audience. Cool, rational argument seems to be out of the question. Many of the ads are “negative”: designed to smear the opponent, often quite unfairly. It would be naive to think that this is purely a modern pathology, or that political campaigns were once upon a time dignified and rational. This was never the case.⁴⁷ Smears, slander, and dirty tricks poisoned political reporting—none of this is something politicians have recently invented. The history of American political campaigns is nothing to be particularly proud of. But the tools have gotten much more potent. Negative ads, “push polling,” and other horrors of modern campaigns depend on our brave new world of technology.

The so-called “debates” on television are not, of course, an exception to the general trend. Yes, they are much longer than thirty-second spots. But any high school debate team could do better. This is because these debates, like the television ads, are not exercises in cool, rational argument. They are occasions for candidates to burnish their image. If, like Richard Nixon in his debate with John F. Kennedy, you look like a thug and have five-o’clock shadow, it hardly matters what you say.

The problems of American politics, and there are many, often have a structural basis. The founding fathers were wise in many ways, but they had no way to look into the future. If they could see what is going on these days, they might have drafted a very different constitutional scheme. For example, members of the House of Representative serve two-year terms; the President serves a four-year term. Members of the House, unless they have a really safe seat, can never stop campaigning. And the campaign to win the nomination for the presidency seems to start earlier and earlier each cycle.

46. See Nathaniel Persily & Kellie Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 119–20, 126 (2004).

47. See LYNN HUDSON PARSONS, *THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828* (2009).

In Great Britain, the Prime Minister has to call an election after five years.⁴⁸ But he or she can decide to call a “snap” election earlier—for example, when public opinion polls suggest that the Prime Minister is likely to win another term. What follows then might be a nasty and brutish campaign, but it will also be short.

The campaign disease affects the judiciary, as well as the legislature and the executive. Federal judges and judges in a few states are appointed, but in most states, the judges are elected, whether they are state supreme court justices or lowly local judges. The point, perhaps, was to subject judges to democratic control. By the twentieth century, however, many states were uncomfortable with this idea. Thus, they replaced contested elections with pseudo-elections; judges got on the bench through appointment, and then ran for election, but without any opponent.⁴⁹ The question was simply yes or no. Few judges ever lost such an election. California adopted this system in 1934. For over fifty years, not a single justice of the California Supreme Court ever lost an election.⁵⁰ But in 1986, a torrent of money helped boot Chief Justice Rose Bird out of office, along with two of her fellow justices.⁵¹

The situation has apparently darkened in recent years. The elections have become much more partisan in many of the states.⁵² In 2000, 8% of sitting judges in non-partisan elections lost their job; in partisan elections, an amazing 45% of the incumbents were defeated.⁵³ Contested elections bring with them all the horrors of regular partisan elections: television ads, smear campaigns, and the corrosive power of money. Here, the Supreme Court has played an important role, but one that many people consider quite negative. The plaintiff in *Republican Party of Minnesota v. White* challenged the Code of Judicial Conduct of the Supreme Court of Minnesota.⁵⁴ According to the Code, a candidate for judicial office was not supposed

48. *How Does Britain Elect Its Government?*, BRIT. EMBASSY U.S., <http://ukinusa.fco.gov.uk/en/about-us/faqs/uk-government/elect-government> (last visited Jan. 10, 2013).

49. Cf. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

50. See Robert Lindsey, *Defeated Justice Fearful of Attacks on Judiciary*, N.Y. TIMES, Nov. 8, 1986, at 7.

51. See Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 8.

52. See generally G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 52, 53 (Keith J. Bybee ed., 2007).

53. Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 tbl.9.4 (Matthew J. Streb ed., 2007).

54. *Republican Party of Minn. v. White*, 536 U.S. 765, 769–70 (2002).

to “announce his or her views on disputed legal or political issues.”⁵⁵ The U.S. Supreme Court struck down this rule; it violated the freedom of speech of judges and candidates for judicial office.⁵⁶ Later cases have extended the doctrine, almost to the point of saying that there is no real difference between running for judicial office and running for any other office.

The results were, alas, predictable. Campaigns have gotten dirtier and dirtier. One of the worst abuses of the process took place in Wisconsin. In 2008, Justice Louis Butler, the only African-American on the state supreme court, lost his seat to Martin Gableman. Gableman ran ads that implied (in a very misleading way) that Butler had helped an African-American rapist go free to rape again. Gableman’s election was challenged, but the Wisconsin Supreme Court, in a sharply divided decision, confirmed his right to the seat.⁵⁷

Of course, the media are not to blame for all of this. Naturally, the media dearly love the income from political ads. They are not responsible for the content. But the system inevitably makes money king. And, as we said, the sheer expense of television advertisement means short, punchy ads; it means sound bites, slogans, brief and pithy statements, all of which are inevitably misleading. It also means that judges have to campaign and raise money, somehow, to support these campaigns. They, of course, cannot promise donors that they will decide cases the way the donors want. But that is certainly implied. Of course, what this means in practice is that donors support judges whose ideology they like. The judges can certainly feel free to take money from groups they agree with anyway.

Still, there is no such thing as money with no strings attached. A study in 2006, conducted by the New York Times, came to the conclusion that justices of the Ohio Supreme Court actually did vote, in most cases, in favor of the interests that had given them money.⁵⁸ Perhaps this is only natural. Should we be troubled by the situation?

Countries without judicial elections avoid this kind of problem. It is easy to feel gloomy and despondent about the trend since the *White* case, and to hope for structural reform. But the problem in the United States is not just a matter of structure. Structure, after all, reflects culture. Our system would be politicized, no doubt, even without judicial elections. Federal justices are appointed, not elected,

55. *Id.* at 770.

56. *Id.* at 788.

57. See Editorial, *A Wisconsin Judge’s Refusal to Recuse*, N.Y. TIMES, Jan. 25, 2012, at A28.

58. See Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1.

but the process requires the Senate to agree, and confirmation is an intensely political affair. It is enough to mention the struggles over the appointment of Robert Bork or Clarence Thomas.⁵⁹

Judicial selection in the United States, in other words, is a structural mess with cultural roots. Many Americans seem unwilling to defer to leaders and experts—more so than citizens of other countries, even countries like Sweden or France, that are genuinely democratic. In most countries, judges are chosen by professionals, and with standards that at least seem to be more impartial, more based on merit. Most people, in most countries, probably think electing judges is just plain weird. But Americans seem to want these elections; indeed, the elections (according to a recent study by James Gibson) actually increase the legitimacy of the courts. Gibson's data also suggest that television ads, for the most part, probably do not impair this legitimacy.⁶⁰

We live in an age of celebrity culture. A celebrity, as I have pointed out elsewhere,⁶¹ is not just a famous person. A celebrity is a famous and *familiar* person.⁶² The President is a celebrity—perhaps *the* celebrity in our society. We see him and hear him every day, on TV above all. We know what celebrities sound like, what they look like, how they dress, how they talk, how they walk, what kind of families they have, how they handle themselves. We see them, as it were, through a one-way mirror. The media and, especially, television have made the celebrity culture possible. The celebrity culture has consequences. People tend to judge public figures in terms of their image, or their “charisma.” Policy and ideology seem less important for many people compared to whether the candidate, for example, seems likeable—somebody you would like to have a beer with. Millions of people voted for President Ronald Reagan because they liked and trusted him, even though they were against some of his policies (if they even

59. See Linda Greenhouse, *Bork's Nomination Is Rejected*, 58–42; *Reagan 'Saddened'*, N.Y. TIMES, Oct. 24, 1987, at 1; Neil A. Lewis, *Law Professor Accuses Thomas of Sexual Harassment in 1980's*, N.Y. TIMES, Oct. 7, 1991, at A1.

60. JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012). Gibson's study, as the name of his book plainly states, is on the legitimacy of courts. The heart of the book is a close study of the impact of elections in Kentucky, but there is no reason to believe that the results of Gibson's survey would be different in other states, since the findings in Kentucky “mirror those from nationally representative surveys.” *Id.* at 137. And, as Gibson is careful to point out, the “legitimacy-giving effects” of elections may or may not outweigh other consequences of the system. *See id.* at 139. In other words, it is quite possible that the system produces bad judges or bad decisions, or a system more corrupted by the need to raise money for campaigns.

61. See LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 225 (2007).

62. *Id.*

knew what they were). A candidate has to “connect” to win office. And this can only be done through the media.

V. CONCLUSION

These have been only a few very tentative and general remarks about the connection between the media, public opinion, and law. Unquestionably, public opinion is a significant (if mysterious) force in molding the legal system. And unquestionably, the media have an impact on public opinion. Law and popular culture, and the impact of the media on law, are subjects that deserve further attention.

Mostly, I have discussed the role of television, and to a lesser extent, movies and the print media. We live today in the age of the Internet, Facebook, and YouTube. Their impact has probably already been immense and will become more so in the future. How all this plays out remains to be seen.

